International Brotherhood of Teamsters, Local 705 (K-Mart) *and* Stephen P. Dayhoff

Teamsters Local 705, International Brotherhood of Teamsters[1] ***and*** **Greta Paschall.** Cases 33–CB–3889 and 33–RD–801

June 27, 2006

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

On August 20, 2003, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent Union filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision, and the Charging Party and the Petitioner jointly filed answering briefs. The Charging Party and the Petitioner also jointly filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, to adopt the recommended Order as modified,[3] and to issue a certification of representative.

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] The Respondent Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's finding that the Union, through Union Steward Joe Boyd, violated Sec. 8(b)(1)(A) by threatening employees with a fine and discharge for supporting decertification of the Union.

In adopting the judge's recommendation that Objection 1 be overruled, we observe that in his "Statement of the Case," the judge stated that the report on objections recommended that Objection 1 be overruled and that Objections 2 and 3 were ordered consolidated with the unfair labor practice proceeding. To clarify the procedural history, we point out that Objection 1 was considered at the hearing because the Petitioner filed exceptions to the Regional Director's report, which the Regional Director then treated as a motion for reconsideration.

[3] We modify the judge's recommended Order to omit the requirement related to notice mailing in the event that the Respondent Union goes out of business or closes the facility involved in this proceeding. See, e.g., *L.D. Kichler Co.*, 335 NLRB 1427 fn. 2 (2001).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Brotherhood of Teamsters, Local 705, Chicago, Illinois, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Board's Subregional Office, post at its union office in Bourbonnais, Illinois, and on its bulletin board at K-Mart, Manteno, Illinois, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by Subregion 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material."

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters Local 705, International Brotherhood of Teamsters, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time general maintenance associates, skilled maintenance associates, general warehouse associates and clerical associates employed by the Employer at its Manteno, Illinois facility; but excluding all human resources clericals, switchboard/receptionist, accounts payable clerical associates, confidential employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. June 27, 2006

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Wilma B. Liebman, Member

_____
Peter N. Kirsanow, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Nicholas M. Ohanesian and *Debra L. Stefanik, Esqs.*, for the General Counsel.
Harry J. Secaras, Esq. (Neal, Gerber & Eisenberg), of Chicago, Illinois, for the Employer.
Jeffrey Burke, Esq., of Chicago, Illinois, for the Respondent/Union.
W. James Young and *Hilary J. Funk, Esqs. (National Right to Work Legal Defense Foundation, Inc.),* of Springfield, Virginia, for the Charging Party and the Petitioner.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of a complaint and notice of hearing (complaint) issued on August 30, 2002,[1] and a report on objections, order consolidating cases and direction of hearing (report on objections) issued on October 8, following a decertification election conducted on August 22.

Paragraph 5 of the complaint alleges that Teamsters Local 705 (the Union) committed violations of Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by the following:

(a) About April 19, Union Steward Joe Boyd threatened employees with a fine for supporting the decertification of the Union.

(b) About April 19, Boyd threatened employees with discharge for supporting the decertification of the Union.

(c) About April 24, Business Agent Jeff Jabaay[2] threatened employees with a fine for supporting the decertification of the Union.

(d) About April 24, Jabaay threatened employees with discharge for supporting the decertification of the Union.

(e) About April 24, Union Steward Chris LaBeau, in the presence of employees, forcibly removed an antiunion petition for the grasp of Jennifer Paschall because of her support for decertification of the Union.

The Union, in its first amended answer, admitted the business agents and union stewards listed in paragraph 4 occupied the positions set forth their respective names. The agency status of Dexter and Jabaay was also admitted, but the agency status of the union stewards, including Boyd and LaBeau, was denied. All allegations in paragraph 5 were also denied.

The report on objections recommended that Objection 1, relating to the Petitioner's receipt of the *Excelsior* list after the Union, be overruled. It further concluded that Objections 2 and 3, relating to allegations of various acts of union misconduct, involved much of the same conduct as in the unfair labor practice case, and raised substantial and material issues best resolved by a hearing. Therefore, Objections 2 and 3 were ordered consolidated with the unfair labor practice proceeding.

Pursuant to notice, a trial was held before me in Kankakee, Illinois, on April 22 and 23, 2002, at which the General Counsel, the Charging Party and the Petitioner, the Union, and K-Mart Corporation (the Employer or the Company) were represented by counsel. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel, the Charging Party and the Petitioner, and the Union filed posthearing briefs, which I have duly considered.

The following were the General Counsel's witnesses: Charging Party Stephen Dayhoff; employees LuAnn Coffield and Jennifer Rene Paschall (the Petitioner's daughter); and Robert Ostrowski, the Employer's human relations manager.

The Charging Party/Petitioner called employee Roger Payne and Petitioner Greta Paschall, and the Union called the following: Business Agents Jeff Dexter and Jeff Jabaay; Stewards Joe Boyd, Chris LaBeau, Gary Johnson, and Dianna Johnson; and employee Janet LaBeau (Chris LaBeau's wife).

On the entire record, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

Background

At all times material, the Employer, a Michigan corporation, with an office and place of business in Manteno, Illinois (the facility), has been engaged in the retail sale of goods. The Employer's status as an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act has not been contested, nor has the Union's status as a labor organization within the meaning of Section 2(5) of the Act.

The Union was previously certified as the collective-bargaining representative of the following employees employed at the facility:

> All full-time and regular part-time general maintenance associates, skilled maintenance associates, general warehouse associates and clerical associates, excluding all human resources clericals, switchboard/receptionist, accounts payable clerical associates, confidential employees, guards and supervisors as defined in the Act.

A collective-bargaining agreement was in effect at the time when a decertification petition herein was filed on July 15.[3] Pursuant to a Stipulated Election Agreement, an election was conducted on August 22. Of approximately 389 eligible voters, 379 voted. The tally was 211 votes for the Union, 166 against, and 2 challenged ballots. Thus, the challenged ballots were not sufficient to affect the outcome of the election.

The Union's main business office is in Chicago. The branch office, located in Bourbonnais, Illinois, has jurisdiction over the county (Kankakee) in which the facility is located. Dexter and Jabaay are the two business agents operating out of the Bourbonnais office, although they on occasion are provided the assistance of business agents from the Chicago office. Dexter has been a business agent for the Union since 1994; Jabaay, since approximately 2000.

[1] All dates are in 2002 unless otherwise indicated.

[2] Although the complaint named Business Agent "Jeff Dexter" in pars. 5(c) and (d), at the hearing, Jennifer Paschall identified the business agent who spoke to her as having been Jeff Jabaay, rather than Dexter, and the General Counsel moved to amend the complaint accordingly. The amendment was allowed without objection.

[3] The agreement was marked for identification as U Exh. 2 but not offered into evidence. The Union and the Employer have negotiated a new agreement, effective from September 16, 2002 to March 14, 2004.

In April, a decertification campaign was begun by some union members, including Dayhoff, Coffield, Greta, and Jennifer Paschall. All of them tendered their resignations from the Union during the period between mid-May and August 22. The Union accepted their resignations, and they were placed on service fee-payer status.

The Union maintains a glass-enclosed bulletin board located near the employee entrance at the Employer's facility, and keys thereto are kept by Jabaay and Ostrowski. Jabaay testified that he posted a memorandum (Exh. 3) on approximately May 16. On union letterhead, and undated, it was signed by Secretary-Treasurer Gerald Zero and addressed to Local 705 members. It stated:

> This is to inform you that internal union charges have been filed against the following 705 members pursuant to the provisions of the International Constitution and Local 705 Constitution and Bylaws: [Jennifer Paschall, Greta Paschall, LuAnn Coffield, Richard Weller, Stephen Dayhoff, and David Fishbaugh][.]
>
> Pursuant to my authority under Article XIX, Section 5 of the International Constitution, I will be appointing a hearing panel to conduct a hearing on these charges.

Jabaay testified that he posted the memorandum "for clarification" (Tr. 321), because the Union had heard there were rumors floating around that everybody was going to get fired and that the Union was filing charges on 200 people. Presumably, he was attempting to let employees in general know that only the six-named employees were being charged. He took the memorandum down after 3 weeks.

Charges were in fact filed against the six individuals.[4] Jabaay testified that Boyd was one of the employees who filed them, and that Stewards Gary LaBeau, Janet LaBeau, and Gary Johnson also may have been among those who filed such charges. It was stipulated that Dexter physically prepared the charges, which were processed through the Union's main office in Chicago. No further action was taken against any of the six members, and by letters dated December 2 from Zero, all of them were notified that the charges against them had been dropped.[5]

The Agency Status of Business Representatives

The parties stipulated that union stewards are elected by the membership; that during the period from April 1 to August 31, Boyd and LaBeau were employees of the Employer and also served as union stewards, in which capacity they processed grievances; and that the Union requested leave from work for Boyd and LaBeau, among others, for purposes of conducting union business.

It was further stipulated that although union stewards were never off on leave to engage in campaigning during the decertification period, the Union had requested that the Employer give 2 weeks off to union stewards to engage in such; that such leave was denied; and that the Union did not tell the Employer the reason for the request.

Ostrowski testified that in approximately May, Boyd complained about Coffield's circulation of a decertification petition to other associates (employees) on company property during worktime, in violation of company policy.[6] Ostrowski assumed that Boyd was acting in his capacity as a union steward, rather than as an employee, but Boyd did not explicitly state such.

On or about August 15, Jabaay, Dexter, and six other nonemployee union representatives came to the facility because, according to Dexter, the Union had reports that grievances were not being processed by the Company. The Company had Jabaay and Dexter, among others, arrested for criminal trespass. The Union stipulated that, to the extent that union stewards were involved, they were acting as agents of the Union.

After Coffield's conversation with Boyd on about April 19, and Jennifer Paschall's conversation with LaBeau on about April 24 (which conversations form the bases for allegations in paragraph 5 of the complaint), both union stewards returned soon afterward with Jabaay, who engaged in further conversation with Coffield and Paschall on the subject of decertification.

Analysis and Conclusions

Section 2(13) of the Act provides:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Indirectly, therefore, the statute adopts the concept of apparent authority. Consistent with that principle, the Board regularly finds elected or appointed officials of an organization to be agents of that organization. While the holding of an elective office does not mandate a finding of authority per se, such status is persuasive and substantial evidence that will be determinative absent compelling contrary evidence. *Mine Workers, Local 1058, (Beth Energy)*, 299 NLRB 389–390 (1990); *Electrical Workers, Local 1453*, 258 NLRB 1427, 1428 (1981) (fn. omitted).

In numerous cases, union stewards have been found to possess apparent authority and therefore to have been agents of their union. See, e.g., *Carpenters Local 67*, 208 NLRB 289, 293 (1974); *Glaziers & Glassworkers, Local 513*, 191 NLRB 461 (1971); *Electrical Workrs Local 640*, 190 NLRB 456 (1971). The applicable standard is whether it was reasonable for persons to have believed that the steward was acting on behalf of the union. *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 (1991); *M. W. Kellog Constructors*, 273 NLRB 1049, 1052 (1984), enfd. in part, 806 F.2d 1435 (9th Cir. 1986); *Teamsters Local 886 (Lee Way Motor Freight)*, 229 NLRB 832 (1977), enfd. 586 F.2d 835 (3d Cir. 1978). Cf. *Penn Yan Express, Inc.*, 274 NLRB 449 (1985). An

[4] Exh. 6.

[5] See Exh. 4, a letter dated December 2 from Gerald Zero, the Union's secretary-general, stating that on August 2, the executive board had dismissed the pending internal union charges "due to your nonmember status." It was stipulated that identical letters were sent to all of the individuals who had been charged. This document was never posted on the Union's bulletin board.

[6] Coffield subsequently received a disciplinary coaching for this.

important consideration in finding such apparent authority is a steward's responsibility on behalf of the union for enforcing the terms of a collective-bargaining agreement on the job, including the authority to attempt to resolve grievances and disputes. *Local 20408, Warehouse, Employees (Dubovsky & Sons)*, 296 NLRB 396, 401 (1989); *M. W. Kellog Constructors*, supra.

Based on the above facts, I find that the union stewards were cloaked with apparent authority to act on behalf of the Union, even if they lacked actual authority. Of particular importance in reaching this determination are the following factors: the union steward position is an elected one; the union stewards handle grievances under the collective-bargaining agreement; Business Agent Jabaay was in the presence of Boyd and LaBeau when he had conversations with employees on the subject of the decertification petition; and when Jabaay and Dexter and other nonemployee union representatives came to the facility on August 5, the union stewards who were with them were stipulated to be acting as agents of the Union.

Accordingly, I find the union stewards to be agents of the Union under Section 2(13) of the Act, as alleged in paragraph 4 of the complaint.

The Alleged Unfair Labor Practices

By Union Steward Boyd

The complaint alleges that on about April 19, Boyd threatened employees with a fine and discharge for supporting decertification of the Union.

Coffield testified that shortly after 3 p.m. that day, she was outside the employee doors to the warehouse, attempting to get employee signatures on a decertification petition. Boyd yelled at her that she could not be doing that, since she was a member of the Union. He stated that she could be fired for this and lose her job and that anyone who signed the petition could also lose their jobs. On cross-examination, she testified that she did not recall Boyd saying anything about her being fined, just that she could be fired. She further testified that they argued for about 15 minutes about whether union representation was good or bad. It was a fairly regular occurrence for both prounion and antiunion employees to position themselves near the warehouse entrance and leaflet employees as they came out of their shifts.

Dayhoff was present during the above conversation. He testified that he observed Coffield and Boyd arguing. Other employees were in the vicinity. Boyd stated that they had no rights to do this (the decertification petition) and would be fined. Further, if they kept doing it, they could be fined $5000, kicked out of the Union, and the Company would have to fire them. Dayhoff further testified that Boyd turned and told him the same thing. Boyd spoke quite loudly, almost shouting.

Boyd admitted telling a couple of employees, in particular, Dayhoff, Coffield, and Greta Paschall, on about April 19 or 20, that "charges could be filed against you . . . and you could be discharged" for attempting to decertify the Union (Tr. 271–272). He testified that he relied on his understanding of a provision in the collective-bargaining agreement that an employee could be discharged if he or she was not a member in good standing. Jabaay told him a few weeks or so later not to mention the contract to people involved in the decertification campaign, and he stopped doing so.

Jabaay testified that it came to his attention in the last week of April or the first week of May, through employees (including Jennifer Paschall) and other business agents, that Boyd was telling employees that they could be fined and discharged for attempting to decertify the Union. He instructed Boyd not to tell anyone that they were going to be charged, expelled, or otherwise subject to adverse action because of such activities.

The Petitioner's counsel elicited from Coffield testimony about a conversation she recalled having with Jabaay on the afternoon of April 19, following her conversation with Boyd. Jabaay testified that he was out of town on April 19 to 21, and he provided substantiating documentation.[7] In any event, the General Counsel has not alleged as a violation anything Jabaay might have said in that conversation,[8] and I therefore need not address it further.

Analysis and conclusions

A union has the right to defend itself against a decertification petition, which attacks its very existence as the exclusive bargaining agent and, under the proviso to Section 8(b)(1)(A) of the Act, it may legitimately expel a member for engaging in decertification efforts. *Tawas Tube Products*, 151 NLRB 46, 48–49 (1965). As stated by the Seventh Circuit Court of Appeals, "Otherwise, a retained member would be privy to the union's tactics and other information during the preelection campaign. Expulsion eliminates the presence of an antagonistic member whose disloyalty would pose such problems to the union."[9]

However, the Board has distinguished between expulsion of members involved in this activity and the imposition of fines on them, holding that the latter is not defensive but punitive—penalizing a member for having sought resort to the Board's processes. *International Molders & Allied Workers Local 125 (Blackhawk Tanning Co.)*, 178 NLRB 208, 209 (1969). See also *Sheet Metal Workers Local 18 (Globe Sheet Metal)*, 314 NLRB 1134, 1135 (1994). In enforcing the Board's decision in *International Molders*, the Seventh Circuit Court of Appeals said:

> The assessment of a fine is not calculated to protect the threatened union. Its only effect is to punish a member who wishes to oust the union as the exclusive bargaining representative. This cannot be justified under the proviso to Section 8(b)(1)(A) in the face of the strong policy which allows union members unimpeded access to the Board.[10]

As stated by the Board in *Boilermakers (Kaiser Cement Corp.)*, "The Sec. 7 right of seeking access to the Board is fundamental in that all others are dependent on it. If the employee

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[7] U. Exh. 5.

[8] See GC Br. at 10–12, contending that Jabaay's threats related only to Paschall.

[9] *NLRB v. International Molders & Allied Workers Local 125*, 442 F.2d 92, 94 (7th Cir. 1971), enfg. 178 NLRB 208 (1969).

[10] Ibid at 95.

cannot come to the Board, he cannot vindicate any of his rights."[11]

Accordingly, threats of internal union fines for supporting decertification have been found to violate Section 8(b)(1)(A). The strong interest of protecting employee access to the Board applies as well to threats of discharge made to employees for their decertification activity, and such threats have also been found to violate Section 8(b)(1)(A). See *Sheet Metal Workers Local 18,* supra*; Papermakers & Paperworkers (Continental Can),* 160 NLRB 1108, 1109 (1966), enfd. 397 F.2d 156 (6th Cir. 1968).

Boyd admitted telling certain employees they could be fined and discharged for their involvement in the decertification campaign. Having found him to be an agent of the Union, I find that his statements were attributable to the Union. I need not address any issue relating to the effect of Jabaay's instruction to Boyd to stop making such statements, since there is no claim that Boyd ever retracted any of them. Indeed, Boyd testified that he never went back to any of the employees concerned and told them they could not be fined or fired for their decertification activity.

Accordingly, I find that the Union violated Section 8(b)(1)(A), as alleged in paragraphs 5(a) and (b) of the complaint.

By Union Steward LaBeau

The complaint further alleges that around April 24, steward LaBeau, in the presence of employees, forcibly removed a decertification petition from the grasp of Jennifer Paschall because of her support for decertification of the Union.

Paschall, LaBeau, and Janet LaBeau testified about this incident. Paschall testified that at about l p.m. that day, she was sitting on a picnic table outside the employee entrance to the warehouse, collecting signatures on a decertification petition. LaBeau came over to her and asked what she was doing. She told him. He asked if he could see the petition, which was lying on the table. She tried to cover it up but did not tell him that he could not. He walked around the table, picked it up, and started reading it. She asked for it back, but he ignored her. When she tried to touch it, he jerked it away and to his other side. He read the petition for about 5 minutes and then put it down on the table and left. An employee who witnessed this incident asked that her name be crossed out from the petition because she did not want to get in trouble with the Union. Later, however, this employee told Paschall that she had decided not to take her name off.

LaBeau's version of his interaction with Paschall was fairly consistent with hers. Thus, he testified that as he was reading the petition, she reached up to get it, but he told that he was not through, and he continued reading. He testified that he had the petition for 3 or 4 minutes. Janet LaBeau was in the vicinity during the incident. Her testimony was consistent with his.

Analysis and Conclusions

I do not find that the allegation as to LaBeau is sustained, even fully crediting Paschall. According to her testimony, the petition was on the table when he picked it up, and although he later moved the document to this other side to prevent her from taking it from him, he at no time actually used any kind of force in removing it from her possession.

Nor do I find that his conduct otherwise rose to the level of coercive such that it violated Section 8(b)(1)(A). *Capitol Aggregates,* 191 NLRB 419, 419–420 (1971), cited by the General Counsel,[12] is distinguishable. There, a superintendent surreptiously opened an employee's lunchbox and removed authorization cards, which he gave to the plant manager. Here, a decertification campaign was already in process. The petition was in open view on the picnic table, in Paschall's presence, and no inherent privacy rights were involved. Paschall did not tell LaBeau that he could not read it, and at no time did he remove it from her presence. I note, also, that although LaBeau was a union steward, he was also a unit employee and had a legitimate interest, as an employee, in the decertification campaign.

Accordingly, I recommend dismissal of paragraph 5(f) of the complaint.

By Business Agent Jabaay

Paschall testified that about 20 minutes after the incident involving LaBeau's reading the petition, described above, LaBeau returned with Jabaay. Jabaay approached and asked if she could give him a few minutes of her time. She said yes. He leaned over the table and started talking loudly and angrily, stating that what she was doing was unconstitutional. He had a union constitution in his hand was pointing to a highlighted part and saying she could be fined and could lose her job. She asked to see the constitution, but he did not give it to her.

Jabaay recalled a conversation on April 24 with Paschall, at the table. LaBeau was also present. He asked if there was anything he could do for her. She stated that she was trying to get the Union out. Jabaay suggested she get more involved with the Union, such as becoming a steward. She responded that the Union was trying to get them (proponents of decertification) fired and fined. Jabaay stated there was no such thing. She said there were all kinds of rumors circulating about that. He told her that no charges had been filed.

Jabaay denied ever telling her that she could be fined or discharged for supporting the decertification drive. He denied having the union constitution and bylaws with him on April 24, when he spoke with her.

As opposed to the conversations between Coffield and Boyd, and Paschall and LaBeau, where the versions of witnesses were not necessarily contradictory on major points, Jabaay's testimony was irreconcilable with Paschall's.

Still later that afternoon, Paschall testified, Jabaay, LaBeau, and other union stewards stood not far from Paschall and talked to employees who were passing by them. She testified that they stood in a way that prevented other employees from approaching her. She heard LaBeau say that she was going to get hers, was going to lose her job, and would be fined thousands of dollars. He specifically said, "The little bitch is gonna get it" (Tr. 130). LaBeau denied ever referring to Paschall as a "a

[11] 312 NLRB 218, 220 fn. 7 (1995).

[12] GC Br. at 9–10.

bitch," and Union Stewards Gary and Diana Johnson, who were present, testified that they never heard LaBeau call her such.

That afternoon, Paschall filed an incident report with the Company, referencing all three incidents.[13] The report is fairly conclusionary as to all of them. It recaps the incident with LaBeau; states that he returned with "a union representative," who asked for a moment of her time and threatened her with a 'chargeable offense' and fines; and goes on to say that, shortly thereafter, LaBeau and the union representative stood outside talking to people as they came in, stating "how stupid I was and what was going to happen to me."

Analysis and Conclusions

Paschall appeared generally credible, and in testifying, she did not seem to deliberately slant the facts. For example, she testified that the petition was on the table when LaBeau arrived, and her testimony was consistent in major respects with both LaBeau's and his wife's. As noted hereinafter, she also testified that after her conversation with LaBeau, an employee asked to cross her name off on the decertification petition but that the employee later changed her mind and left it on. Her report to the company was broadly consistent with her testimony. Although the Union contends her credibility was impeached by her failure in that report to state that LaBeau called her "a bitch,"[14] as I noted, the report was conclusionary rather than detailed, and Paschall did state therein that derogatory remarks were made about her.

In any event, this would constitute impeachment on a collateral matter, since any descriptions LaBeau used for her do not form the basis for any allegations in the complaint. Even if Paschall is discredited on her testimony that LaBeau called her "a little bitch," I would not find this a sufficient basis to conclude that her testimony as a whole was unreliable.

Jabaay's testimony concerning the reason he posted the memorandum on May 16 was not convincing. He testified that he posted it for "clarification," so that employees in general would know that they would not be subject to internal union disciplinary action for their participation in the decertification campaign. However, the memorandum on its face only stated that the six-named employees, who were spearheading the decertification campaign, were being brought up on charges. Additionally, although Jabaay testified that he told Boyd by early May not to threaten employees with fines or termination for engaging in decertification activity, there is nothing in the memorandum to that effect.

Rather than allay employee fears, as Jabaay testified the memorandum was supposed to do, it is reasonable to assume that the memorandum exacerbated them. His rather nonsensical testimony on this important matter must be deemed to raise doubts about his overall credibility.

Although both Jabaay and Paschall testified that LaBeau was present during their encounter, and he was called as a union witness, he was not asked any questions concerning their conversation. In light of the clash of testimony between Paschall and LaBeau, one must wonder why not. I agree with the General Counsel[15] that it is appropriate to draw an adverse inference from the Union's failure to ask LaBeau about the incident. I have found that he exercised apparent authority on behalf of the Union, and it has to be concluded that he was predisposed toward the Union. See *Excel Corp.*, 324 NLRB 416, 417 (1997); *International Automated Machines*, 285 NLRB 1122, 123 (1987).

In light of my comments about Paschall's credibility, Jabaay's suspect testimony concerning why the memorandum was posted, and the Union's failure to have LaBeau testify about the conversation, I credit Paschall's version that Jabaay threatened her with a fine and discharge for supporting the Union's decertification.

Therefore, I find that the Union violated Section 8(b)(1)(A), as alleged in paragraphs 5(c) and (d) of the complaint.

The Objections to the Election

The *Excelsior* List

Objection 1 alleges that the election should be set aside because the Region delayed providing the Petitioner with the *Excelsior* list, and she received it after the Union did.

A Stipulated Election Agreement was approved by the officer-in-charge on August 5. The Employer timely submitted the election eligibility list on August 12, and the list was immediately mailed to the Petitioner and faxed to the Union at 5:12 p.m. The next day, the Board agent discovered that the Union's list had been sent by fax. Remembering that the Petitioner had asked that the proposed stipulated election agreement be faxed to her husband's place of employment, the agent had the list faxed to her husband at 10:33 a.m. on August 13. The certified mail receipt verifies that the Petitioner received the mailed list on August 15.[16]

Analysis and Conclusions

In *Excelsior Underwear*, 156 NLRB 1236 (1966), the Board held that in representation cases, employers must, within 7 days of the approval of a consent election agreement or direction of election, file with the Regional Director an election eligibility list containing the names and addresses of all eligible voters. This list must be furnished to the petitioner as soon as the list is received. *Mod Interiors*, 324 NLRB 164, 165 (1997). The *Excelsior* rule is designed "to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can fully and freely exercise their Section 7 rights." *Mod Interiors* at 164, citing *North Macon Health Care Facility*, 315 NLRB 359, 360 (1994).

The Board has addressed the timeliness of receipt of the *Excelsior* list in recent cases. In *Alcohol and Drug Dependency Services*, 326 NLRB 519 (1998), the Board held that an election be set aside when the union, as a result of errors committed by the Regional office, did not receive the *Excelsior* list until 5 days before the election. The Board rejected the employer's

[13] U. Exh. 1.

[14] U. Br. at 16–17.

[15] GC Br. at 11.

[16] These facts are taken from the report on objections (GC Exh. 1(j)), which was admitted without objection. No testimony was offered by any witnesses on the *Excelsior* list matter.

argument that the union needed to provide specific evidence that it was prejudiced by late receipt of the list. Ibid at 520, fn. 8. In effect, the Board found that such prejudice could be objectively inferred by, inter alia, the dispersement of unit employees over five locations, and the "extremely close" vote. Ibid at 520. See also *Special Citizens Futures Unlimited*, 331 NLRB 160 (2000) (employees at three locations). These factors are not present here.

In *J. P. Philips Inc.*, 336 NLRB 1279 (2001), the Board held that an election be set aside when the petitioner received a full *Excelsior* list 7 and 10 days before the two locals which constituted the Intervenor. The Board pointed out that the rationale behind the rule applies equally when two unions are seeking to represent employees. Ibid at 2. By extension, the same conclusion would be reached when is a decertification petitioner and a union.

In this matter, it is undisputed that after faxing the list to the Union at 5:12 p.m. on August 12, the Region faxed it at 10:33 a.m. the next day to the Petitioner's husband, to whom she had requested the proposed stipulated election agreement be sent. In the absence of any evidence presented to the contrary, it must be presumed that the fax was received by her husband that morning. Thus, I conclude that the Petitioner constructively received the list approximately 17 hours after the Union, hardly a significant delay, and had it for 9 days prior to the election. In light of this, as well as the single location of unit employees and the 45-vote margin by which the Union won the election, I conclude that, objectively speaking, no prejudice resulted to the Petitioner from the slight delay in transmission of the *Excelsior* list.

Accordingly, I recommend that Objection 1 be overruled.

Union Conduct

Objections 2 and 3 allege that the Union engaged in various acts of misconduct, including but not limited to the actions alleged to be unfair labor practices. The Petitioner contended that the Union's conduct created such an atmosphere of fear that it destroyed the necessary "laboratory conditions" under which the election should have been conducted, thereby requiring that the election be set aside.

The unfair labor practices charges that constituted part of the basis for the Petitioner's claim that the Union interfered with the election were described above.

In terms of other alleged interference prior to July 15, Dayhoff testified that he saw Dexter at the warehouse at about 2 p.m. on May 16. Jabaay was also present. Dexter walked up to him, handed him an envelope (in which inside was a notice to appear at a union hearing), and said, "See you in court, smart ass" (Tr. 64). About an hour later, as Dayhoff was leaving the facility for the day, he encountered Dexter, Jabaay, and several other people. Dexter repeated the above statement. When asked at the hearing whether he called Dayhoff a "smart ass," Dexter answered, "Probably" (Tr. 236).

After Dayhoff learned of the charges against him on May 16, he spoke to other employees involved in the decertification campaign. Thereafter, and prior to the August 22 election, many employees asked him questions about the charges, and some said they would not sign because they were afraid they might be fired. He could not remember the specific employees who talked to him. After the decertification petition was filed, approximately 25 to 50 other employees referred to this memorandum in speaking to Dayhoff. Jennifer Paschall observed employees looking at it, and a few employees asked her about it. Some employees told her they were afraid they would lose their jobs or get fined. Greta Paschall also observed employees looking at it.

Greta Paschall testified that several Hispanic employees complained about union representatives coming to visit them during the period before the election and making threats, but she could not identify any of these employees by their full names. In any event, none of them testified at the hearing, and any evidence relating to the visits was therefore only hearsay. The General Counsel has not alleged any such conduct by union representatives to have constituted unfair labor practices. Regarding the election, I find the Petitioner has failed to provide sufficient evidence to conclude that these house visits interfered with necessary laboratory conditions.[17] Accordingly, I need not address this matter further.

Analysis and Conclusions

It is well established that the results of a Board-supervised and certified election are presumptively valid and that the burden of proof is on the objecting party to prove that alleged misconduct warrants setting aside the election, to wit, showing that the misconduct affected the outcome of the election. *Safeway, Inc.*, 338 NLRB 525 (2002); *Consumers Energy Co.*, 337 NLRB 752 (2002); *Campbell Products Dept.*, 260 NLRB 1247 fn. 2 (1982), enfd. 707 F.2d 1393 (3d Cir. 1983); T*empco Electric Heater Corp. v. NLRB*, 999 F.2d 1109, 1111 (7th Cir. 1993). This burden is a heavy one. *Quest International*, 338 NLRB 856, 857 (2003); *Safeway, Inc.* The closeness of the vote is a relevant factor in determining whether employees could exercise free choice in the election. *Quest International*, supra at 857 fn. 1, citing *Avis Rent-a-Car system*, 280 NLRB 580, 581 (1986).

Generally, the relevant timeframe for considering alleged objectionable conduct is the period after the filing of the petition. *More Truck Lines*, 336 NLRB 772 (2001): *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278 (1961); *NLRB v. Wis-Pac Foods Inc.*, 125 F.3d 518, 521 (1997). Only in very limited circumstances will the Board consider prepetition conduct. *Dresser Industries*, 242 NLRB 74 (1974). This is when prepetition conduct lends meaning and dimension to postpetition conduct or assists in evaluating it. *Shamrock Coal Co.*, 267 NLRB 625 (1983); *Dresser Industries*, 231 NLRB 591 fn. 1 (1977), enfd. in part, 580 F.2d 1053 (9th Cir. 1983); *Stevenson Equipment Co.*, 174 NLRB 865 fn. 1 (1969). Once again, in determining whether an election should be set aside for prepetition conduct, the Board takes into account the closeness of the

[17] The Petitioner's counsel contends that the Petitioner could not pursue these allegations further because I quashed her subpoena for certain union documents. See P. Br. 17, fn. 8. However, the Petitioner neither called as witnesses any of the employees directly involved in the home visits, nor requested subpoenas to compel their attendance to testify.

election. See *BCI Coca-Cola Bottling Co. of Los Angeles*, 339 NLRB 67, 69 (2003).

In this matter, all of the conduct I have found constituted unfair labor practices occurred in April. Dexter's remarks to Dayhoff in May, even if construed to be a reaffirmation of earlier threats to fine or discharge Dayhoff, occurred a couple of months prior to the filing of the decertification petition on July 15. Similarly, even if the posting of the memorandum is considered to relate to threats of fine or discharge, it was removed in June. There is thus no evidence that on or after July 15, the Union reiterated any earlier threats to fine or have discharged anyone participating in the decertification campaign.

The election was not a close one: 211 votes were cast for the Union; 166 against.

Based on the above, I find that the Petitioner has failed to meet its evidentiary burden of showing that union conduct affected the outcome of the election and warrants setting it aside.

Therefore, I recommend that Objections 2 and 3 be overruled. Accordingly, having found no merit to the Petitioner's objections to the election, I further recommend that the Subregional Office issue a certification of election in Case 33–RD–801, consistent with the results of the election conducted on August 22, 2002.

CONCLUSIONS OF LAW

1. By threatening employees with internal union fines and discharge from their employment because of their support for the decertification of International Brotherhood of Teamsters, Local 705 (the Respondent), the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. By threatening employees with internal union fines and discharge from their employment because of their support for the decertification of the Respondent, the Respondent violated Section 8(b)(1)(A) of the Act.

3. By the conduct set forth in paragraphs 1 and 2 above, the Respondent has not interfered with the representation election conducted in Case 33–RD–801.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, International Brotherhood of Teamsters, Local 705 (the Union), Chicago and Bourbonnais, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from threatening employees with internal union fines and discharge from their employment because they support decertification of the Union.

(a) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Board's Subregional Office, post at its union office in Bourbonnais, Illinois, and at its bulletin board at K-Mart, Manteno, Illinois, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by Subregion 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 19, 2002.

(b) Sign and return to the Subregional Office, sufficient copies of the notice for posting by K-Mart, Manteno, Illinois, if willing, at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Subregional Office, file with the Subregional Office a sworn certification of a responsible official on a form provided by the Subregion, attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 20, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT threaten you with internal union fines or discharge from your employment because you support our being decertified as your bargaining representative.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 705 (K-MART)